

05-10-2007

BZ

SUD BOSNE I HERCEGOVINE



СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Суд БиХ, СДП БиХ
Грађанско одјељење I Апелационо одјељење
Кривично одјељење I Апелационо одјељење
Одјел I I Одјел II Одјел I - Одјел II
Одјељење за судску управу Одјељење за судску управу

X: KRŽ/05/42

PREJDI DOLO. 735

Number: X-KRŽ-05/42
Sarajevo, 20 August 2007

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting in the Panel of the Appellate Division consisting of Judge Azra Miletić, as the Presiding Judge, and Judges Finn Lynghjem and José Ricardo de Prada Solares, as members of the Panel, with the participation of the Legal Advisor Melika Bušatlić, as a minutes-taker, in the criminal case against the Accused Nikola Andrun for the criminal offense of War Crime against Civilians in violation of Article 173 (1) c) and e) of the Criminal Code of Bosnia and Herzegovina (hereinafter: BiH CC), deciding upon the Appeals filed respectively by the Prosecutor's Office of Bosnia and Herzegovina (hereinafter: Prosecutor's Office of BiH) number KT-RZ-28/05 dated 9 March 2007 and the Defense Counsel for the Accused, lawyers Hamdo Kulenović and Nikica Gržić, against the Verdict of the Court of Bosnia and Herzegovina, number X-KR-05/42 dated 14 December 2006, at the session held in the presence of the Accused, his Defense Counsel Hamdo Kulenović and the Prosecutor of the Prosecutor's Office of BiH, Vesna Tančica, on 20 August 2007 rendered the following:

DECISION

Granting the appeals filed respectively by the Prosecutor's Office of Bosnia and Herzegovina and the Defense Counsel for the Accused Nikola Andrun, thus revoking the Verdict of the Court of Bosnia and Herzegovina, number X-KR-05/42 dated 14 December 2006 and a new trial is hereby scheduled before the Appellate Division of the Section I for War Crimes of the Court of Bosnia and Herzegovina.

REASONING

By the Verdict of the Court of Bosnia and Herzegovina, number X-KR-05/42 dated 14 December 2006 the Accused Nikola Andrun was pronounced guilty of the criminal offense of War Crimes against Civilians under Article 173 (1) c) and e) of the CC of BiH in conjunction with individual criminal responsibility under Article 180 (1) of the CC of BiH, committed by the actions described under section 2, 4, 5, 9, 11, 12 and 13 of the operative part of the first instance Verdict. By the same Verdict the accused was acquitted of the charges that in the manner described under section 1, 3, 6, 7, 8, and 10 of the operative part of the first instance Verdict he committed the criminal offense of War Crimes against Civilians in violation of Article 173 (1) c) and e) of the CC of BiH.

For the above mentioned criminal offense the first instance panel sentenced him to 13 /thirteen/ years of imprisonment, and the time the Accused spent in custody was credited towards the sentence of imprisonment, while applying Article 188 (4) of the Criminal Procedure Code of Bosnia and Herzegovina, the Accused was relieved of the duty to reimburse the costs of the criminal proceedings.

Pursuant to Article 198 (1) and (2) of the CPC of BiH, the injured parties Mirzo Čolaković, Mirsad Omanović and Džemal Topić are hereby referred to take civil action with their claims under civil procedure law.

The Defense Counsel for the Accused, lawyers Hamdo Kulenović and Nikica Gržić, and the Prosecutor of the Prosecutor's Office of BiH filed timely appeals against the above mentioned Verdict.

The Defense Counsels for the Accused filed the appeal for erroneous application of substantive law, essential violation of the provisions of criminal procedure and the state of the facts being erroneously or incompletely established, proposing to the Appellate Panel of the Court of BiH to grant the arguments of the appeal, revoke the first instance verdict and schedule a trial before the panel of the Appellate Division. Also, the defense stressed that it disputed the decision as to the sanctions, because the first instance court did not take into consideration the mitigating circumstances to a sufficient extent, while at the same time it gave significant weight to the aggravating circumstances and pronounced a lengthy and inadequate punishment which is inappropriate to the level of responsibility of the Accused.

The Prosecutor's Office filed the appeal for the essential violations of the criminal procedure provisions, and erroneously and incompletely established state of facts as well as for the decision on the sanction, proposing that the Appellate Panel of the Court of BiH grant the appeal, revoke the acquitting part of the first instance verdict by a decision and schedule a new trial with respect to that part.

The Defense Counsels for the Accused filed the response to the appeal of the Prosecutor's Office of BiH in which they stated that arguments presented by the prosecution were ungrounded.

At the session of the Appellate Panel, held on 20 August 2007, pursuant to Article 304 of the CPC of BiH, both parties gave brief presentations of their appeals and responses to the appeals, and supported the presented arguments and proposals entirely.

Having reviewed the contested Verdict insofar as contested in the Appeal, the Appellate Panel decided as stated in the operative part for the following reasons:

The arguments of the appeal of the Prosecutor that in reference to the reasoning of the acquitting part of the Verdict, the first instance court did not give valid reasons for its decision, are grounded. In other words, in the reasoning of the contested Verdict the first instance court was bound, pursuant to Article 290 (7) of the CPC of BiH, to state specifically and completely which facts and on what grounds the Court found to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence and the reasons guiding the Court in ruling on legal matters and especially in ascertaining whether the criminal offense was committed and whether the accused was criminally responsible.

The Appellate Panel is of the opinion that in the concrete case the first instance Court failed to evaluate the presented evidence in the manner stipulated by Article 281 (2) of the CPC of BiH, particularly testimonies of the witnesses, both by correlating them and within the context of the nature of the criminal offense about whose elements they testified, as well as the elapse of time, the circumstances and manner of perpetration. The panel also failed to give a valid explanation as to why it accepted parts of the testimonies of the witnesses heard at the main trial as credible, while it did not accept the other parts as credible, which, for example, was the case of the testimony provided by the witness Džemal Topić, as justifiably indicated in the appeal of the Prosecutor's Office, whereby the criminal procedure provisions under Article 297 (1) (k) of the BiH CPC, were essentially violated thus the Appellate Panel finds that it give rise to suspicion as to the correctness of the state of facts established by the first instance verdict.

Furthermore, the arguments of the appeal filed by the Defense Counsels are justified in stating that, in reference to section 13 of the operative part of the first instance Verdict, the first instance panel established the state of the facts erroneously and incompletely. More specifically, in order to define some actions as inhuman treatment, it is necessary to establish intentional doing or act of omission which causes a severe physical or mental suffering or is a severe attack on the human dignity. In the contested verdict the first instance court in abstract manner establishes that direct and indirect evidence indicate the intentional conduct on the part of the accused with regards to the hiding of detainees. Furthermore, the first instance court established on the basis of the statements of the witnesses heard that being hidden from the Red Cross representatives caused fear on their part, however it failed to establish the consequence, that is, it failed to establish the potential severe mental suffering, for the fear itself may not be equivalent to the severe mental suffering. The first instance panel failed to establish the facts and circumstances based on which it concluded that knowing that they were intentionally hidden from the Red Cross representatives caused severe mental suffering to the prisoners. Also, the first instance court established the factual basis that the prisoners may have been in fear for their lives, which, in opinion of the Appellate Panel, is not an establishment of facts but an assumption, however, the assumption itself does not have a sufficient degree of possibility based on which the existence of the decisive facts could be established.

Taking into consideration the established deficiencies related to the essential violation of the criminal procedure provisions and erroneously established *state of facts*, the Appellate Panel granted the appeals pursuant to Article 315 (1) (b) of the BiH CPC, revoked the first instance verdict and scheduled a new hearing before the Panel of the Appellate Division of the Court of BiH.

In the retrial the essential violation of the criminal procedure provisions shall be removed, the already adduced evidence shall be presented again, and after evaluation of other arguments in the appeal other evidence shall be presented as required.

Having in mind that the first instance verdict was revoked, the Appellate Panel did not provide detailed analysis of other complaints in the appeals, but presented summarized reasoning for its revoking pursuant to Article 316 of the BiH CPC.

MINUTES-TAKER
Melika Bušatić
[signature affixed]

PRESIDING JUDGE
JUDGE
Azra Milčić

Sud Bosne i Hercegovine, Sarajevo, ul. Kraljice Jelene br. 88;

[signature affixed]

REMEDY: No appeal shall be allowed against this Decision.

*I hereby confirm, [redacted] is a true translation of the original written in
Bosnian/Serbian/Croatian, [redacted]
Sarajevo, 21 September 2001.
[redacted]
Certified Court Interpreter [redacted]*